

## **Required Forms Guide\* for Real Estate Brokers & Salespersons**

\* This guide is NOT a substitute for reading the regulations and understanding all the requirements as they apply to your license! Required documents for Audits are subject to change due to law and rule revisions. Please view the “Rule Notices” posted periodically on the Board’s website ([www.realestate.mt.gov](http://www.realestate.mt.gov)), located under the “Regulations” tab.

**If you have questions, comments, or concerns:**

Please contact the Board Office at [dlibsdrre@mt.gov](mailto:dlibsdrre@mt.gov) or (406) 841-2321.

### **ADMINISTRATIVE RULES AND STATUTES:**

Administrative Rules of Montana (ARM) – [www.mtrules.org/gateway/chapterhome.asp?chapter=24%2E210](http://www.mtrules.org/gateway/chapterhome.asp?chapter=24%2E210)  
Montana Code Annotated (MCA) – [http://leg.mt.gov/bills/mca\\_toc/index.htm](http://leg.mt.gov/bills/mca_toc/index.htm)

### **SELLER AGENT FILES should include:**

- Listing Agreement – ARM 24.210.641(5)(an) and 37-51-102(15), MCA
- Agency Disclosure – 37-51-313, MCA and 37-51-314, MCA
- Signed Buy/Sell Agreement – ARM 24.210.641(5)(l)
- Signed Buy/Sell Agreement Addendums or provision changes – ARM 24.210.641(5)(l)
- Megan’s Law Disclosure – 37-51-105, MCA
- Radon Disclosure (Inhabitable Prop.) – ARM 24.210.641(5)(x) and 75-3-606, MCA
- Methamphetamine Disclosure (if applicable) – 75-10-1305, MCA
- Mold Disclosure (if applicable) – 70-16-703, MCA
- Lead-Based Paint Disclosure (if applicable) – ARM 24.210.641(5)(y) and Section 1018 of Title X (Federal)
- Power of Attorney (POA) or related legal form (if applicable) – ARM 24.210.641(5)(e) and 71-1-102, MCA
- Documentation of earnest fund receipt by the designated holder (if applicable) – ARM 24.210.426(8)

### **CO-LISTING AGENT FILES should include:**

- Each licensee involved must maintain a complete file as indicated under **SELLER FILES**.

### **BUYER AGENT FILES should include:**

- Buyer Broker Agreement – ARM 24.210.641(5)(am) and 37-51-102(7), MCA
- Agency Disclosure – 37-51-313, MCA and 37-51-314, MCA
- Signed Buy/Sell Agreement – ARM 24.210.641(5)(l)
- Signed Buy/Sell Agreement Addendums or provision changes – ARM 24.210.641(5)(l)
- Megan’s Law Disclosure – 37-51-105, MCA
- Radon Disclosure (Inhabitable Prop.) – ARM 24.210.641(5)(x) and 75-3-606, MCA
- Methamphetamine Disclosure (if applicable) – 75-10-1305, MCA
- Mold Disclosure (if applicable) – 70-16-703, MCA
- Lead-Based Paint Disclosure (if applicable) – ARM 24.210.641(5)(y) and Section 1018 of Title X (Federal)

- Power of Attorney (POA) or related legal form (if applicable) – ARM 24.210.641(5)(I) and 71-1-102, MCA
- Documentation of earnest fund receipt by the designated holder (if applicable) – ARM 24.210.426(8)

#### **DUAL AGENT FILES should include:**

- All documents as listed under both the **SELLER** and **BUYER** files.

#### **STATUTORY AGENT FILES should include:**

- Agency Disclosure – 37-51-313, MCA and 37-51-314, MCA
- Signed Buy/Sell Agreement – ARM 24.210.641(5)(I)
- Signed Buy/Sell Agreement Addendums or provision changes – ARM 24.210.641(5)(I)

#### **TRUST ACCOUNTS & REAL ESTATE TRANSACTIONS:**

If a broker elects to use a trust account to hold funds in a real estate transaction, all documentation must be maintained and able to be presented as described in ARM 24.210.426. Brokers may maintain more than one trust account and/or a single trust account may be utilized by an office/firm.

**PLEASE NOTE:** A broker who uses a trust account is responsible for the trust account, *even if they have designated authority for maintenance of the trust account to another broker.* ARM 24.210.426(3) states, “Delegation shall not relieve either broker from responsibility for any failure to comply with these trust account requirements whether by the delegating broker or the designated broker.” In short: *if a broker does not want to be held responsible for a trust account, they should not use a trust account.*

Each trust account must have its own set of records. During an audit, the following records need to be available:

- |                                  |   |
|----------------------------------|---|
| ○ Monthly bank statements        | ○ General ledger/check register         |
| ○ Monthly reconciliation reports | ○ Individual transaction ledgers        |
| ○ Proofs of deposit              | ○ Personal funds ledger (if applicable) |
| ○ Copies of checks               |   |

Examples of a check register/general ledger, personal funds ledger, and transactions ledger can be found on the Board’s website ([www.realestate.mt.gov](http://www.realestate.mt.gov)), under the “Trust Account Information” tab.

#### **OTHER INFORMATION:**

**The Board’s required documents may not be inclusive of all required documents to a real estate transaction.**

As a licensee, you are still required to abide by all licensing statutes and Administrative Rules, and any state and federal requirements that may affect your real estate license and/or a real estate transaction. Failure to abide by the statutes and Administrative Rules is considered unprofessional conduct as described in ARM 24.210.641 and may result in action being taken against your license.

Additional applicable State and Federal laws and rules include, but are not limited to the following:

- Residential Tenants’ Security Deposits Laws – Title 70, chapter 25, MCA
- The Residential Landlord Tenant Laws – Title 70, chapter 24, MCA
- Landlord and Tenant Residential and Commercial Laws – Title 70, chapter 26, MCA
- The Montana Residential Mobile Home Lot Rental Act – Title 70, chapter 33, MCA
- The Fair Housing Act – <https://www.justice.gov/crt/fair-housing-act-1>

- Lead-Based Paint Disclosure - <https://www.epa.gov/lead/real-estate-disclosure>
- State Human Rights Statutes – Title 49, MCA
- Americans with Disabilities Act (ADA) – [www.ada.gov](http://www.ada.gov)
- Megan’s Law Disclosure – ARM 24.210.828(3)(f) and 37-51-105, MCA
- Montana Fair Housing – [www.montanafairhousing.org](http://www.montanafairhousing.org)

### PROPERTY MANAGEMENT:

Licensed brokers and salespersons may practice property management under their license, but they must also comply with all Administrative Rules and Statutes applicable to licensed Property Managers; refer to ARM 24.210.641(5)(z).

Salespersons and supervising brokers, please note: salespersons may use their license to practice property management *as long as their supervising broker has consented to supervising these activities*. If the supervising broker does not consent to overseeing their salesperson’s property management activities, the salesperson is required to obtain a separate property manager license if they are not exempt from property management licensure as described under 37-51-602, MCA. If the salesperson is solely managing their own rental property, please refer to 37-51-309, MCA for guidance.

Even if a licensed broker or salesperson is managing their own property(s), they must still comply with all Administrative Rules and Statutes applicable to licensed property managers.

- **ARM 24.210.641 Unprofessional Conduct.** (5) In addition to all other provisions contained in the statutes and rules administered by the board, the following are considered unprofessional conduct: (z) failing, while acting as a property manager as defined in 37-51-102, MCA, to abide by the requirements of Title 37, chapter 51, part 6, MCA, and the requirements of the Board of Realty Regulation’s rules for property management as set forth in ARM 24.210.805 and 24.210.828, except for the advertising requirements of ARM 24.210.828(3)(u).

Please refer to the Montana Board of Realty Regulation’s **Required Forms Guide for Property Managers** for additional information.

### QUESTIONS & ANSWERS:

- Q.** *How long do I have to keep all of the required transaction and trust account documentation?*
- A.** Eight years from the latter of the date of receipt or the date the transaction was completed – ARM 24.210.601(1).
- Q.** *Can I use REALTOR® forms?*
- A.** You may, if you are a member of the National Association of REALTORS®, Montana Association of REALTORS®, or other Association of REALTORS®.

You may not, if you are not a member of the National Association of REALTORS®, Montana Association of REALTORS®, or other Association of REALTORS®.

The 2017 Legislature revised and the Governor approved of revisions to 37-51-321, MCA, on February 17, 2017 (refer to HB 122). Under these revisions, if any licensee is found to be using these forms without

authorization on or after February 17, 2017, under 37-51-321, MCA, **a Board-generated complaint may be filed against their license**. If you have discontinued your membership and have used these forms in the past, you are encouraged (but not required) to keep documentation showing when you were a member.

- **37-51-321, MCA. Revocation or suspension of license -- initiation of proceedings -- grounds.** (1) The following practices, in addition to the provisions of 37-1-316 and as provided in board rule, are considered unprofessional conduct for an applicant or a person licensed under this chapter: (d) use of the term "realtor" by a person not authorized to do so or using another trade name or insignia of membership in a real estate organization of which the licensee is not a member.

**Q.** *Can the Board provide templates of the required forms?*

**A.** No. Please refer to your brokerage, a legal counselor, or other relevant source.

**Q.** *Is an agreement with a buyer required if I'm a Dual Agent?*

**A.** Yes, an agreement with a buyer is required any time you are working on behalf of a buyer, including in dual agency transactions. Not having this agreement is considered unprofessional conduct under ARM 24.210.641(5)(am). Please refer to the following if you have questions: 28-2-903(1), 37-51-102(8) and (11), 37-51-313(4) and (7), and 37-51-314(3) and (10), MCA.

**Q.** *Why shouldn't I designate myself as a Seller, Buyer, and Dual Agent when completing an initial agency disclosure with my client?*

**A.** To avoid the possibility of a misunderstanding between a client and an Agent, the Board advises licensees to only designate the actual agency relationship the Agent has with the client. In a single transaction, the Agent is either 1) a seller agent, 2) a seller and dual agent, 3) a buyer agent, or 4) a buyer and dual agent; the Agent cannot be all three in the same transaction. Please see 37-51-102, MCA, for the applicable definitions.

**Q.** *Can I have a listing agreement or buyer broker agreement with my client when I'm acting as a Statutory Broker?*

**A.** No. There can never be an Agent who is both a Statutory Broker and a Seller or Buyer Agent for another client in the same transaction at the same time. A Statutory Broker is one who assists one or both parties to a transaction, but is not the agent of either. If the Agent has no written agreement, the Agent is presumed to be a Statutory Broker and continues in that capacity until the transaction is concluded. However, if the Statutory Broker enters into a listing agreement with a seller or buyer broker agreement with a buyer, they automatically stop being a Statutory Broker; at that point in time, they become either a Seller Agent, Buyer Agent, or Dual Agent. Please see 37-51-102, MCA, for the applicable definitions.

**Q.** *I have a license, but 37-51-103 and 37-51-602, MCA, say I might be exempt from licensure. Why am I still required to comply with the Board's rules and statutes?*

**A.** If you have a license, you are subject to the Board's rules and statutes and must conduct yourself according to those rules and statutes. If you have questions, please contact the Board office.

**Q.** *Do I have to use a trust account to hold transaction trust funds?*

**A.** No. Brokers used to be required to maintain a trust account, but this is no longer the case. As long as you have a designated holder of trust funds (such as a title company or other third party), you do not have to have a trust account – ARM 24.210.426(6). **Please note**, however, that you are required to obtain and maintain documentation of receipt by the designated holder.

**Q.** *What if my trust account records are kept electronically?*

**A.** Records may be maintained in any manner you choose; however, they must be maintained in a manner to permit auditing. If you use an accounting software to maintain your trust account, ensure that your software can provide the records in a format compliant with the Board's requirements. If you are audited and unable to present the records in a manner compliant with ARM 24.210.426, this may negatively impact your audit outcome – ARM 24.210.426(10). Examples of a general ledger, personal funds ledger, and owner and tenant ledgers can be found on the Board's website ([www.realestate.mt.gov](http://www.realestate.mt.gov)), under the "Trust Acct." tab.

**Q.** *I'm being audited and I'm unable to provide the trust account records in a Board-compliant format. Can't I just give the Auditor access to my accounting software and let the Auditor find the information?*

**A.** No. Accessing your software is a liability for the Auditor, the Board, and for you. You are required to know how to operate the software you choose.

**Q.** *Can I use a CD or other investment account/portfolio to hold trust funds?*

**A.** No. Please refer to the *Certificates of Deposit in Trust Accounts* position statement at [www.realestate.mt.gov](http://www.realestate.mt.gov), found under the "Board Information" section. A CD is like a long-term savings account – the bank intends and expects the money to be retained in the account for a fixed term and there is generally a penalty if the funds are accessed prematurely. Additionally, trust funds must **never** be placed in a situation where they are at risk of being lost.

Trust funds are intended to be fluid and held in a readily accessible account. In a CD, the funds are not readily accessible, which means *the source of funds does not change*. The only way to bypass the inaccessibility factor is to combine the CD with at least one readily accessible trust account, into a single ledger and treat the accounts as if they are one readily accessible account.

Under ARM 24.210.426, **each** trust account is required to have its own set of ledgers and **each** trust account is required to be reconciled monthly (unless there has been no activity). If a broker is found to be combining their accounts and required ledgers, they may be found in violation of ARM 24.210.426(5)(i), (5)(i)(i) to (vii), (5)(j), (5)(k), and (6).

**Q.** *Can I use a sweep account to hold trust funds?*

**A.** While the Board does not have an official position on sweep accounts, most licensees have not been able to meet the trust account requirements while using sweep accounts.

In sweep account scenarios, two or more bank accounts are used to hold trust funds: usually, one account has a low or zero percent interest rate and the other account has a high interest rate. The lower-rate account typically has a balance limit and when the funds go above or below the limit, funds are swept to and from the high-interest account, where the bulk of the funds are maintained. Sweep accounts are very active and the sweeping/transfer activity is *usually* automated by the bank on a daily basis.

Audits of sweep accounts have found that most licensees were not monitoring the excessive activity and instead combining the accounts into a single ledger, and treating the accounts as if they were a single account (which enabled them to forgo recording all of the transfers between the accounts). When licensees were monitoring and recording the transactions, they were not identifying whose funds (the original source of funds) were being transferred.

Similar to CD scenarios, if a broker is found to be combining their accounts and required ledgers, they may be found in violation of ARM 24.210.426(5)(i), (5)(i)(i) to (vii), (5)(j), (5)(k), and (6).

- Q.** *I conduct property management and I have a license, but 37-51-602, MCA, says I might be exempt from property management licensure. Why am I still required to comply with property management licensure provisions?*
- A.** If you have a license, you are subject to the Board's rules and statutes and must conduct yourself according to those rules and statutes. If you have questions, please contact the Board office.
- Q.** *Can the Board provide legal advice about forms or other matters?*
- A.** No. You are free to ask questions and we will provide answers to the best of our abilities, but you may be encouraged to seek legal counsel in some instances.
- Q.** *Can the Board distribute and/or provide hardcopies of the Administrative Rules and statutes?*
- A.** No. Licensees are responsible for ensuring they are using the most current Administrative Rules and statutes, which can be found online (refer to the **ADMINISTRATIVE RULES & STATUTES** and **OTHER INFORMATION** section of this guide). If you are interested in obtaining official hardcopies of Administrative Rules and statutes, please contact the Montana Secretary of State's office and the Montana Legislative Services Division respectively.
- Q.** *I have more questions...*
- A.** **Asking questions will not trigger an audit** – audits are conducted randomly. Please feel free to contact the Board Office at [dlibsdrre@mt.gov](mailto:dlibsdrre@mt.gov) or (406) 841-2321 if you have any questions, comments, and/or concerns. If you are currently being audited and have questions, please contact the Auditor at your earliest convenience as instructed in the letter you received.